Supreme Court, U.S.
FILED

98 995 DEC 16 1998

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No.

In the
Supreme Court of the United States
October Term, 1998

HARRY ROBISHEAUX,
Petitioner

v.

MEMORIAL CITY REGIONAL MALL,
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

Does the State of Texas deprive a civil litigant of the constitutional right of adequate, effective and meaningful access to court when a mistake of the Secretary of State of Texas does not toll the statute of limitations and leaves the plaintiff without an adequate remedy at law.

PARTIES TO THE PROCEEDINGS

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

PROCEEDINGS BELOW 3

REASONS FOR GRANTING THE WRIT 4

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE LOWER COURTS DEPRIVE CIVIL LITIGANTS OF THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS, WHICH CONFLICTS WITH THE PRIOR RULINGS OF THIS COURT 4

CONCLUSION 7

APPENDIX A 1a

APPENDIX B 3a

APPENDIX C 4a

APPENDIX D 9a

TABLE OF AUTHORITIES

Cases **Page**

Baker v. Goldsmith,
582 S.W.2d 404 (Tex. 1979) 6

Bounds v. Smith,
430 U.S. 817, 97 S.Ct. 1491,
52 L.Ed.2d 72 (1977) 4

California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct.
609,30 L.Ed.2d 642 (1972) 4

Chambers v. Baltimore & Ohio Railroad,
207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907) 4

Continental Southern Lines v. Hilland,
528 S.W. 2d 828 (Tex. 1975) 7

Matthew's Trucking v. Smith,
682 S.W. 2d 237 (Tex. 1984) 6, 7

Petro Chemical Transport, Inc. v. Carroll,
544 S.W.2d 240 (Tex. 1974) 6

Ryland v. Shapiro,
708 F.2d 967 (CA 5 Tex. 1983) 4, 5

Wolff v. McDonnell,
418 U.S. 539, 94 S.Ct. 2963,
41 L.Ed.2d 935 (1974) 5

STATUTES

V.A.T.S. Bus. Corp. Act, art. 2.04 - 2.09 5

UNITED STATES CONSTITUTION

28 U.S.C. § 1257(1257) 1

Article IV, Sec. 2 1

Amendment I 1

Amendment V 1

Amendment XIV 2

Plantiff Harry Robisheaux respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The Texas Supreme Court denied the petition for review.

The Court of Appeals for the First District of Texas issued its opinion on May 28, 1998, affirming the summary judgment of the 55th District Court of Harris County, Texas.

STATEMENT OF JURISDICTION

The judgment of the Texas Supreme Court was entered on September 17, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2 of the Constitution of the United States provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States".

Amendment I of the Constitution of the United States provides in relevant part: "Congress shall make no law respecting...the right of the people...to petition the Government for redress of grievances."

Amendment V of the Constitution of the United States provides in relevant part: "No person shall be...deprived of life, liberty or property without due process of law..."

Amendment XIV of the Constitution of the United States provides in relevant part: "...nor shall any State deprive any person of life, liberty, or property, without due process of laws..."

STATEMENT OF THE CASE

The fundamental question in this case is whether the State of Texas deprives civil litigants in Texas of the fundamental constitutional right of access to the courts where a mistake of the Secretary of State of Texas does not toll the statute of limitations and leaves the litigant without an adequate remedy at law.

On August 5, 1994, Petitioner fell to the pavement at Memorial City Mall sustaining serious injuries. On July 26, 1996, Petitioner filed his Original Petition against the Defendant, Memorial City Mall, incorrectly naming it Kirkland of Memorial City Mall as a result of incorrect information received from the office of the Secretary of State of Texas stating that the Memorial City Mall was doing business as Kirkland of Memorial City Mall and could be served through the registered agent of Kirkland of Memorial City Mall. On August 9, 1996, Kirkland of Memorial City Mall was served. On September 25 1996, Petitioner's counsel was informed that Kirkland of Memorial City Mall is a store located inside the Memorial City Mall, and not the proper defendant. On the same day, Petitioner then filed a First Amended Petition against the proper defendant, Memorial City Mall, naming Memorial City Regional Mall. On October 1, 1996, Memorial City Regional Mall was served and filed an original answer on October 21, 1996 stating that its correct name is Metro National Corporation.

On April 24, 1997, the trial court granted Respondent's Motion for Summary Judgment on the basis of limitations.

On June 4, 1997, the trial court denied Petitioner's Motion for New Trial.

Petitioner filed his Appellate brief on September 15, 1997. Petitioner informed the lower courts of the mistake of the Secretary of State in his appellate brief, and in his Petition for Review in which he argued that "it was a misapplication of the statute of limitations to hold that Petitioner's action is barred, and deprive a citizen of his right to a day in court...". Petitioner availed himself of each step of the appeal process to attempt to find a way into the courthouse of the State of Texas after the office of the Secretary of the State of Texas gave his attorney's assistant incorrect information regarding the registered name and registered agent of the party against whom he wished to file suit. This caused suit to be filed against the wrong defendant, and left Petitioner without access to the court after the statute of limitations had run, as the State of Texas does not allow a mistake of the Secretary of State of Texas to toll the statute of limitations.

PROCEEDINGS BELOW

The Court of Appeals of the First District of Texas affirmed the judgment of the district court on May 28, 1998.

Petitioner timely filed a Petition for Review in the Supreme Court of Texas which was denied on September 17, 1998.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE LOWER COURTS DEPRIVE CIVIL LITIGANTS OF THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS, WHICH CONFLICTS WITH THE PRIOR RULINGS OF THIS COURT.

The right of access to the courts is basic to our system of government, and it is well established today that it is one of fundamental right protected by the Constitution. In *Chambers v. Baltimore and Ohio Railroad*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed.143 (1907), the Supreme Court characterized this right of access in the following terms:

The right to sue and defend in the courts is the alternative to force. In an organized society it is the right conservative of all rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. 207 U.S. at 148, 28 S.Ct. at 35.

It is clear that the Court viewed the right of access to the courts as one of the privileges and immunities accorded to citizens under Article 4 of the Constitution and the Fourteenth Amendment. *Ryland v. Shapiro,* 708 F.2d 967 (CA 5 Tex. 1983)

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Supreme Court found in the first amendment a second constitutional basis for this right of access, indicating "The right of access to the courts is indeed but one aspect of the right of petition." *Id.* 92 S.Ct. @ 612.

A third constitutional basis for the right of access to the courts is found in the due process clause. *In Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)

The due process right of access has even been construed to allow prisoners meaningful access to the courts, which must be "adequate, effective and meaningful", *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

Under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only compelling interests will justify such intrusions. *Ryland v. Shapiro, supra* @ 972.

The State of Texas, however, deprives its civil litigants of the fundamental right of access to the courts when the office of the Secretary of State gives incorrect information and the State refuses to toll the statute of limitations when a wrong defendant is sued, leaving the litigant without a remedy when suit is filed out of time against the correct defendant.

The Secretary of State of Texas is charged with the responsibility of being the office in which the State's corporations file their corporate name and registered agent. V.A.T.S. Bus. Corp. Act, art. 2.04 - 2.09. Attorneys and litigants are channeled into that office to ascertain the name and registered agent of those whom they wish to sue, without recourse to other sources of information.

When the Secretary of State gives incorrect information about the name of a party or its registered agent, however, which results in suit being filed against the wrong defendant, the statute of limitations is not tolled to allow the

litigant reasonable time to correct the mistake.

The use of "official mistake" to avoid the effect of a judgment has been applied to cover mistakes made by officers of the court or official court functionaries. *Matthew's Trucking v. Smith*, 682 S.W.2d 237 (Tex. 1984), citing *Baker v. Goldsmith*, 582 S.W. 2d 404, 407 (Tex. 1979); *Petro Chemical Transport, Inc. v. Carroll*, 544 S.W.2d 240 (Tex.1974).

The Secretary of State, however, is not an officer of the court or an official court functionary, and the Supreme Court of Texas has held that the "official mistake" rule would not be extended to that office. *Matthew's Trucking, supra* @ 239.

In the instant case, Petitioner received incorrect information from the office of the Secretary of State which caused him the file suit against the wrong defendant. Immediately upon being informed of the error, and less than sixty days after the statute of limitations had run, Petitioner filed an amended petition against the proper defendant. Despite the mistake of the office of the Secretary of the State, the respondent here was granted summary judgment on the basis of limitations, because the Secretary of State's error would not toll the statute of limitations.

Aware of the earlier ruling of the Texas Supreme Court regarding "official mistake", Petitioner focused his appellate arguments on the rule that in cases of misidentification where there is a genuine of issue of material fact as to whether the proper defendant was cognizant of the facts, was not prejudiced or placed at a disadvantage in obtaining relevant evidence to defend a suit, and had a business relationship with the misidentified defendant, then the statute of limitations would not operate to bar plaintiff's

suit. *Continental Southern Lines v. Hilland,* 528 S.W.2d 828, 831 (Tex.1975); *Matthew's Trucking v. Smith,* 682 S.W.2d 237 (Tex.1984).

Petitioner argued that given the facts in his case, which included the mistake of the Secretary of State; the fact that the correct defendant was cognizant of the facts, had a business relationship with the misidentified defendant, was not prejudiced or placed at a disadvantage in obtaining relevant evidence, and considering his diligence in filing suit against the correct defendant immediately upon being informed of the Secretary of State's error, it was a misapplication of the statute of limitations to bar his suit, and to deprive him of access to the court.

CONCLUSION

This case presents a question of exceptional importance, whether the State of Texas deprives its civil litigants of one of the "highest and most essential rights of citizenship", the right of access to the courts, when, after a state official makes an error, it fails to toll the statute of limitations for a reasonable time so that the litigant can correct the mistake for which the state is at fault, with diligence of the type exhibited by this Petitioner.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF TEXAS
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September 17, 1998

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RE: Case Number 98-0663
Court of Appeals Number: 01-97-00889-CV
Trial Court Number: 9637141

Style: HARRY ROBISHEAUX
v.
MEMORIAL CITY REGIONAL MALL

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review, as supplemented, in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Michael H. Kopp, Deputy
Michael H. Kopp, Deputy

cc: Ms. Stephanie Lavake, Clerk
Mr. Charles Barcarisse

APPENDIX B

Court of Appeals
First District of Texas

JUDGMENT

HARRY ROBISHEAUX, APPELLANT	Appeal from the 55th District Court of Harris County, Texas. (Tr.Ct.No. 963714). Panel consists of Justices Cohen, Taft, and Nuchia.
NO. 01-97-00889-CV	
V.	
MEMORIAL CITY REGIONAL MALL, APPELLEE	Opinion delivered by Justice Cohen.

The cause heard today by the Court is an appeal from the judgment signed by the court below on April 24, 1997. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was no reversible error in the judgment. It is therefore **CONSIDERED**, **ADJUDGED**, and **ORDERED** that the judgment of the court below be in all things **affirmed**.

It is further **ORDERED** that appellant, **HARRY ROBISHEAUX**, pay all costs incurred by reason of this appeal. It is further **ORDERED** that the appellant's surety, **UNIVERSAL SURETY OF AMERICA**, is jointly and severally liable for the payment of the costs incurred by reason of this appeal to the extent of the surety's liability on its bond.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Cohen, Taft, and Nuchia.

Judgment rendered May 28, 1998

APPENDIX C

Opinion issued May 28, 1998

In The
Court of Appeals
For the
First District of Texas

NO. 01-97-00889-CV

HARRY ROBISHEAUX, Appellant
V.
MEMORIAL CITY REGIONAL MALL, Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 9637141

OPINION

Harry Robisheaux sued "Memorial City Regional Mall" for injuries received in a fall. "Memorial City Regional Mall" is an assumed name of Metro National Corporation.[1] Metro National Corporation was granted summary judgment based on limitations. We affirm.

Facts

On August 5, 1994, Robisheaux fell at the entrance to Memorial City Regional Mall. This was a common area,

---

[1] The misnomer of Metro National Corporation as "Memorial City Regional Mall" is not at issue in this case.

not space leased to any tenant. On July 26, 1996, Robisheaux sued "Kirkland of Memorial City Mall," which apparently was a tenant at the mall. Robisheaux, however, had intended to sue the mall's owner, not any tenant.[2] On September 25, 1996, Robisheaux discovered the error and amended his petition, naming and soon serving "Memorial City Regional Mall" as the only defendant. In response to the service of that citation, Metro National Corporation filed an answer, saying it was doing business as "Memorial City Regional Mall."

Analysis

Robisheaux asserts the trial judge erred in granting Metro National Corporation's motion for summary judgment based on limitations and overruling his motion for new trial. We follow the usual standard of review. TEX. R. CIV. P. 166a(c); *Randall's Food Mkts. Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). A defendant seeking summary judgment based on limitations must conclusively prove that affirmative defense. *Veliscol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997).

Misnomer

In his third point of error, Robisheaux asserts the statute of limitations was tolled because there was a misnomer. A misnomer occurs when a plaintiff sues the right defendant, but calls it by the wrong name. *Enserch*

---

[2] Robisheaux's attorney asserts that her assistant was told by the Secretary of State's Office that "Kirkland of Memorial City Mall" was the appropriate party to sue. A mistake by the Secretary of State that causes a plaintiff to sue the wrong corporate defendant, however, is not grounds for tolling the statute of limitations. *Matthews Trucking Co. v. Smith*, 682 S.W.2d 237, 239 (Tex. 1985).

Corp. v. Parker, 794 S.W.2d 2, 4-5 (Tex. 1990). A misnomer tolls the statute of limitations, permitting a subsequent amended petition to relate back to the date of the original petition. [3] *Id.* If, however, the plaintiff sues and serves the wrong defendant, that is a misidentification. *Id.* at 5. In that case, limitations generally is not tolled. *Id.*

Here, Robisheaux sued the wrong defendant, "Kirkland of Memorial City Mall," within the limitations period, but did not sue the right defendant, "Memorial City Regional Mall," until limitations expired. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 1998) (two-year statute of limitations). "Kirkland of Memorial City Mall" is a separate entity from "Memorial City Regional Mall" and from Metro National Corporation. Thus, Robisheaux misidentified his defendant rather than misnaming it. Consequently, limitations was not tolled.

We overrule the **third** point of error.

Misidentification

Though misidentification generally does not toll the running of limitations, an exception exists if a "sufficiently intertwined" business relationship existed between the defendant that was timely sued and the defendant asserting limitations. *Enserch*, 794 S.W.2d at 5; *Hernandez v. Furr's Supermarkets, Inc.*, 924 S.W.2d 193, 196 (Tex. App.—El Paso 1996, writ denied) (in misidentification case, business relationship required to equitably toll limitations); *Cummings v. HCA Servs., Inc.*, 799 S.W.2d 403, 406 (Tex. App. —

---

[3] For example, Robisheaux's misnomer of Metro National Corporation as "Memorial City Regional Mall" would have tolled the statute of limitations if the suit against "Memorial City Regional Mall" had been timely filed and served.

Houston [4th Dist.] 1990, no writ) (same). Limitations is then equitably tolled if the defendant knew the facts of the accident, was not misled about the lawsuit, and was not prejudiced in obtaining evidence to defend the lawsuit. *Continental S. Line, Inc. v. Hilland*, 528 S.W.2d 828, 831 (Tex. 1975). In his first and second points of error, Robisheaux asserts there was a fact issue as to whether this exception applied.

Robisheaux asserts that the business relation between "Kirkland of Memorial City Mall" and Metro National Corporation was sufficient. We disagree. The business relationship must be "so intertwined that suit against the first corporation gave the second corporation notice of, and a reasonable opportunity to defend the case." *See Enserch*, 794 S.W.2d at 5. Here, "Kirkland of Memorial City Mall," whatever its character, was a separate entity from Metro National Corporation and from its assumed name, "Memorial City Regional Mall." They are not intertwined. Their only relationship was a landlord and tenant. Thus, limitations was not equitable tolled.[4]

---

[4] Robisheaux asserts that his claim letter sent to "Memorial City Shopping Center Management Office" gave Metro National Corporation timely notice of his claims. Because Robisheaux did not establish a sufficiently intertwined business relationship, we do not reach that issue.

Robisheaux also asserts that evidence presented in his motion for new trial created a fact issue. We will not consider this evidence because it was not before the judge when she rendered summary judgment. TEX. R. CIV. P. 166a(c); *Rodriguez v. Spencer*, 902 S.W.2d 37, 45 (Tex. App. — Houston [1st Dist.] 1995, no writ). Robisheaux contends he did not have the evidence before the summary judgment hearing because appellee did not timely answer his discovery. If so, the remedy was to take action before the summary judgment was granted by filing a motion to compel or a motion for continuance.

We overrule the **second** and **third** points of error.

We affirm the judgment.

Murry B. Cohen
Justice

Panel consists of Justices Cohen, Taft, and Nuchia.

Do not publish. TEX. R. APP.P. 47.

APPENDIX D

NO. 96-37141

HARRY ROBISHEAUX	§	IN THE DISTRICT
	§	COURT OF HARRIS
VS.	§	COUNTY, TEXAS
	§	55TH JUDICIAL
KIRKLAND OF	§	DISTRICT
MEMORIAL CITY MALL	§	

ORDER

BE IT REMEMBERED that on this day came on to be considered Defendant Metro National Corporation's Motion for Summary Judgment. The Court, after having considered the pleadings, the Motion for Summary Judgment, and the arguments of counsel, is of the opinion and finds that there is no genuine issue of material fact that Plaintiff Harry Robisheaux filed his claims and causes of action against Defendant Metro National Corporation outside of the applicable statute of limitations. Defendant Metro National Corporation's Motion for Summary Judgment based on the applicable statute of limitations is hereby **GRANTED**. It is, therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff Harry Robisheaux's claims and causes of action against Defendant Metro National Corporation be and are hereby dismissed with prejudice, a Final Judgment will be entered reflecting the same, and that all costs of Court are taxed against the party incurring the same.

All relief not expressly granted herein is **DENIED**.

SIGNED on this the ____ day of _____, 1997.

JUDGE PRESIDING

CMS\262192

APPROVED AS TO FORM AND CONTENT:

HAYS, McCONN, RICE & PICKERING

By /s/ Clay M. Steely

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Supreme Court, U.S.
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No. 98-995

In The

Supreme Court of the United States

October Term, 1998

HARRY ROBISHEAUX,

Petitioner,

v.

MEMORIAL CITY REGIONAL MALL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does Petitioner's failure to properly present and preserve a federal question destroy the Supreme Court's Jurisdiction over this case?

PARTIES TO THE PROCEEDINGS

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Harry Robisheaux

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RESPONDENT-DEFENDANT

METRO NATIONAL CORPORATION
There is no parent corporation or nonwholly-owned subsidiaries.

RESPONDENT'S COUNSEL

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES

Respondent, Metro National Corporation, respectfully submits this Brief in Support of its request that this Court deny Petitioner's Petition for Writ of Certiorari.

OPINIONS BELOW

The opinions of the Court of Appeals for the First District of Texas and the denial of Petitioner's Petition of Review by the Texas Supreme Court are reproduced as Appendix A and Appendix B to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

An Order of the Texas Supreme Court was entered on September 17, 1998. No petition for rehearing was submitted to the Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a); however, as discussed below, Petitioner failed to timely and specifically present a federal question to the Texas Courts and thus this Court does not have any jurisdiction over Petitioner's Petition; the decision over which Petitioner seeks review does not dispose of an issue of federal law.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

The statute relevant to this case is 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

Respondent respectfully disagrees with Petitioner's Statement of Facts. There is no basis for this Court to review Petitioner's factbound contentions, which have already been rejected by the trial Court and the Court of Appeals for the First District of Texas. Petitioner did not file his Original Petition against Respondent on July 26, 1996; he filed it on October 1, 1996, sixty (60) days after the running of the applicable statute of limitations. Petitioner's continual reliance on the allegation of obtaining improper or inaccurate information from the Texas Secretary of State was rejected by the Courts of the State of Texas, is inaccurate, based on inadmissible evidence, and does not raise a federal issue for this Court to address.

On April 24, 1997, the trial Court granted Respondent's Motion for Summary Judgment and entered a take-nothing judgment against all claims and causes of action of Petitioner against Respondent. On May 28, 1998, the Court of Appeals of the First District of Texas affirmed the Judgment. Petitioner filed his Petition for Review with the Supreme Court of Texas on July 9, 1998. On July 10, 1998, Petitioner filed his Supplemental Point of Error No. 4 to Petitioner's Petition for Review to the Supreme Court of Texas.

Petitioner failed to ever complain or present to the trial Court, Court of Appeals for the First District of Texas, or the Supreme Court of Texas, any timely request,

objection, or motion that any aspect of the trial Court's ruling or judgment raised a federal question or that it violated any specific constitutional right of Petitioner; equal protection, due process or otherwise. Although Petitioner's Supplemental Point of Error No. 4 makes a reference to his "equal protection and due process right", he fails to cite the federal or state constitution, or any specific amendments under the federal or state constitution on which he relies. See Appendix A. Petitioner's attempt to now assert a federal question involving violations of specific provisions of the United States Constitution is untimely, and these arguments have not been properly presented or preserved. As a result, this Court lacks jurisdiction in this case.

REASONS TO DENY PETITIONER'S WRIT

I. Petitioner failed to present or preserve a federal question to the Supreme Court of Texas and this Court does not have jurisdiction over this matter.

This Court has long adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision that the Supreme Court has been asked to review. *Adams v. Robertson*, 117 S.Ct. 1028, 1029 (1997). Petitioner must establish that a federal question was properly and timely presented to the highest state court and that that court had a fair opportunity to address the federal question on which Petitioner bases its Petition for Writ of Certiorari. *Id.; Webb v. Webb*, 101 S.Ct. 1889, 1894. (1981). Additionally, this Court's Rule

14.1(g)(i) requires Petitioners provide this Court with specific references to the places in the record where the matter appears so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a Writ of Certiorari. A Petitioner's failure to satisfy these minimal requirements destroys this Court's jurisdiction to grant a Writ of Certiorari. *Adams,* 117 S.Ct. at 1031; *Webb,* 101 S.Ct. at 1891-1892.

The basic concept of error preservation under Texas law is that claims not made at the trial court cannot be made for the first time in the appellate courts. *Branden v. Downey,* 811 S.W.2d 922, 929 (Tex. 1991); *Susman Godfrey, L.L.P. v. Marshall, Inc.,* 23 SW2d 105, 109 (Tex. App. – Dallas 1992 org. proceeding). Texas Rule of Appellate Procedure 33.1(a) provides that as a prerequisite to presenting a complaint on appellate review, the record must show (1) that the complaint was made to the trial court by timely request, objection or motion that stated the grounds for a ruling that the complaining party; and (2) that the trial court ruled on the request, objection or motion or refused to rule on the request. Tex. R. App. P. – 33.1(a) (Vernon 1997). Failure to satisfy these requirements results in waiver of any error from a Texas trial court.

Petitioner has not demonstrated that he complied with Texas' rules for raising and preserving a federal question before the Texas Supreme Court, the Texas Court of Appeals for the First District of Texas, or the Texas District Court. Petitioner failed to present any claim to the Texas Courts by timely request, objection or motion that any aspect of the District Court's ruling or judgment raised a federal question or violated any of Petitioner's specific federal or state constitutional rights. The Texas

Supreme Court was unable to rule and did not rule on any federal issue because none were presented to the Texas Supreme Court. Petitioner has failed to comply with this Court's and the Texas court's requirements for federal error presentation and preservation. Petitioner cannot make specific references to the federal question raised below, in compliance with this Court's Rule 14.1(g)(i), because no federal question was presented to the Texas Supreme Court. This Court lacks the jurisdiction necessary to grant Petitioner's Petition for Writ of Certiorari and the Writ should be denied.

CONCLUSION

Because Petitioner failed to present or preserve a federal question to the Texas Supreme Court, and because Petitioner has failed to comply with the Supreme Court's Rules concerning preservation and presentation of a federal question, this Court lacks jurisdiction to grant Petitioner's Petition for Writ of Certiorari, and the Writ should be denied.

Respectfully submitted,

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Attorneys for Respondent
Metro National Corporation

APPENDIX A

App. 1

No. _____

IN THE

SUPREME COURT

OF TEXAS

HARRY ROBISHEAUX

Petitioner,

v.

MEMORIAL CITY REGIONAL MALL

Respondent

Appealed from the First Court of Appeals
at Houston, Texas
No. 01-97-00889-CV

SUPPLEMENTAL POINT OF ERROR NUMBER FOUR TO PETITION FOR REVIEW

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POINT OF ERROR NUMBER FOUR IT IS ERROR TO DENY PETITIONER HIS EQUAL PROTECTION AND DUE PROCESS RIGHT OF ACCESS TO COURT, BASED ON THE STATUTE OF LIMITATIONS, WHEN PETITIONER'S ERROR WAS CAUSED BY THE MISTAKE OF AN OFFICIAL FUNCTIONARY OF THE STATE OF TEXAS

When there is reliance on erroneous official information given by an official functionary preventing a proper filing, this Court has allowed the litigant relief. *Baker v. Goldsmith,* 582 S.W.2d 404 (Tex. 1979); *Gracey v. West,* 422 S.W.2d 913 (Tex. 1968); *Hanks v. Rosser,* 378 S.W.2d 31 (Tex. 1964). That relief has not been extended when a mistake is made by an official functionary of the Secretary of State which causes a litigant to be deprived of his due process right of access to the courts. *Matthew's Trucking v. Smith,* 682 S.W.2d 237 (Tex. 1984).

The reasoning which forms the basis for relief in the first instance is that it is the official duty of the functionary to know what his office records show, and when he gives an inquiring litigant the wrong information within that field the litigant is not at fault. *Alexander v. Hagedorn,* 378 S.W.2d 31. That same reasoning should form the basis of relief for Petitioner in the instant case as it is the mistake of a state official which serves to deny Petitioner his right to bring his case before the court. This is particularly true in this case, given the fact that the Secretary of State's office is established by the state of Texas to be the primary source from which litigant's attorneys determine the agent for service.

As recited earlier in this brief, the information obtained by Petitioner's counsel's legal assistant, from

the Secretary of State, was that Respondent's correct name was Kirkland's of Memorial City Mall, and that it could be served through its registered agent, CT Corporation. (See Exhibit 3 of Plaintiff's Summary Judgment Response.) It is this action by a state of Texas official functionary that caused Petitioner's counsel to misidentify the defendant, and to lose his right to seek damages in court.

Petitioner has established that an official functionary of the state of Texas caused the mistake by which he is now denied his equal protection and due process right to redress through the court system. Based on the fact that a mistake made by an official of the agency of the state of Texas which is directed to provide information regarding agents for service, Petitioner should be granted relief from the rules of the statute of limitations, and allowed to exercise his equal protection and due process right of access to the courts.

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